

JAN 2003

TERM

STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
Mark J. Cavanagh, Jane E. Markey, Jessica R. Cooper

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

Supreme Court No. 120256

Court of Appeals No. 228262

Lower Court No. 99-4574-01

NTUKU ALIAKBAR,

Defendant-Appellant.

WAYNE COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee

CHARI K. GROVE (P25812)
Attorney for Defendant-Appellant

DEFENDANT-APPELLANT'S BRIEF ON APPEAL
*****ORAL ARGUMENT REQUESTED*****

STATE APPELLATE DEFENDER OFFICE

BY: CHARI K. GROVE ((P25812))
Assistant Defender
State Appellate Defender Office
Suite 3300 Penobscot
645 Griswold
Detroit, MI 48226

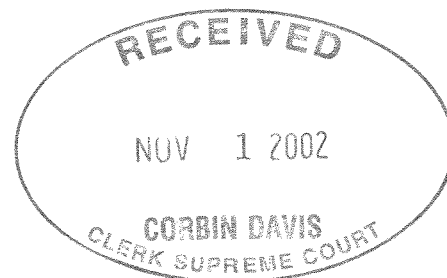


TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	i
STATEMENT OF QUESTIONS PRESENTED	iii
STATEMENT OF JURISDICTION.....	ivv
STATEMENT OF FACTS.....	1
I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN SENTENCING MR. ALIAKBAR TO SEVEN AND ONE HALF TO TWENTY YEARS IN PRISON, NEARLY FOUR TIMES THE MINIMUM GUIDELINES SENTENCE, WITHOUT STATING ON THE RECORD OBJECTIVE AND VERIFIABLE, SUBSTANTIAL AND COMPELLING REASONS NOT ALREADY CONSIDERED IN THE GUIDELINES; THE TRIAL COURT ABUSED ITS DISCRETION IN DEPARTING FROM THE GUIDELINES WITHOUT SUBSTANTIAL AND COMPELLING REASONS.....	4
SUMMARY AND RELIEF SOUGHT.....	20

{VMckg}*SC Brief.doc*19474 October 31, 2002
Ntuku Aliakbar

TABLE OF AUTHORITIES

CASES

<u>Duncan v Walker</u> , 533 US 167 (2001)	10
<u>Field v Mans</u> , 516 US 59 (1995).....	10
<u>Fletcher v Fletcher</u> , 447 Mich 871 (1994)	6
<u>Koon v United States</u> , 518 US 81 (1996)	10
<u>People v Adair</u> , 452 Mich 473 (1996)	6
<u>People v Antolovich</u> , 207 Mich App 714 (1994)	18
<u>People v Armstrong</u> , 247 Mich App 425 (2001)	8
<u>People v Babcock</u> , 244 Mich App 64 (2000)	6
<u>People v Babcock</u> , 250 Mich App 463 (2002)	7
<u>People v Benson</u> , 200 Mich App 598 (1993)	18
<u>People v Carpenter</u> , 446 Mich 19 (1994).....	6
<u>People v Coles</u> , 417 Mich 523 (1983)	11
<u>People v Fields</u> , 448 Mich 58 (1995).....	6
<u>People v Harris</u> , 190 Mich App 652 (1991)	17
<u>People v Hegwood</u> , 465 Mich 432 (2001).....	7
<u>People v Hornsby</u> , ____ Mich App ____ (#227945, 5-24-2002)	8
<u>People v Houston</u> , 448 Mich 312 (1995).....	8
<u>People v Lukity</u> , 460 Mich 484 (1999).....	6
<u>People v Manning</u> , 243 Mich App 615 (2000)	6
<u>People v Milbourn</u> , 435 Mich 630 (1990)	17
<u>People v Perry</u> , 216 Mich App 277 (1996).....	6

<u>United States v Barajas-Nunez</u> , 91 F3d 826 (CA 6, 1996).....	9
<u>United States v Barber</u> , 200 F3d 908 (CA 6, 2000).....	8
<u>United States v Crouse</u> , 145 F3d 786 (CA 6, 1998).....	9
<u>United States v Griffith</u> , 17 F3d 865 (CA 6, 1994)	6
<u>United States v Guy</u> , 978 F3d 934 (CA 6, 1992).....	9
<u>United States v Sabino</u> , 274 F3d 1053 (CA 6, 2001)	9
<u>United States v Watts</u> , 519 US 148 (1997).....	15

CONSTITUTIONS, STATUTES, COURT RULES

MCL 769.34(3)	16
MCL 777.34	15
MCR 2.613C	6

STATEMENT OF QUESTIONS PRESENTED

- I. DID THE TRIAL COURT ERR AS A MATTER OF LAW IN SENTENCING MR. ALIAKBAR TO SEVEN AND ONE HALF TO TWENTY YEARS IN PRISON, NEARLY FOUR TIMES THE MINIMUM GUIDELINES SENTENCE, WITHOUT STATING ON THE RECORD OBJECTIVE AND VERIFIABLE, SUBSTANTIAL AND COMPELLING REASONS NOT ALREADY CONSIDERED IN THE GUIDELINES; DID THE TRIAL COURT ABUSE ITS DISCRETION IN DEPARTING FROM THE GUIDELINES WITHOUT SUBSTANTIAL AND COMPELLING REASONS?

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

STATEMENT OF JURISDICTION

Defendant-Appellant was convicted in the Wayne County Circuit Court by bench trial, and a Judgment of Sentence was entered on May 24, 2000. A Claim of Appeal was filed on June 28, 2000 by the trial court pursuant to the indigent defendant's request for the appointment of appellate counsel dated May 30, 2000, as authorized by MCR 6.425(F)(3). The Court of Appeals affirmed Mr. Aliakbar's sentence in an unpublished, per curiam opinion dated October 2, 2001. This Court granted leave to appeal in an order dated September 18, 2002.

This Court has jurisdiction in this appeal as of right provided for by Mich Const 1963, art 1, §20, Const 1963, art 6, secs 1 and 4; MCL 600.308(1); MCL 770.3; MCR 7.203(A), MCR 7.204(A)(2); MCR 7.301, and MCR 7.302.

STATEMENT OF FACTS

Defendant Ntuku Aliakbar was charged with arson of a dwelling and elected a bench trial. His mother, Haniyyah Aliakbar, testified that on January 17, 1999, shortly after 7:00 a.m., she noticed that there was a fire in the driveway of her home. (15a). She identified a letter that she received at her house. She claimed that the handwriting was that of her son, Ntuku, and she admitted to opening the letter even though it was addressed to her other son, Marwan. (16a).

Marwan Aliakbar testified that when he woke up on January 17, 1999, he saw Defendant outside his window, in the driveway, with a bag in his hand. There was a bottle in the bag, which Defendant lit and threw at the window. (18a-19a). Marwan saw flames and put out the fire with a fire extinguisher. The police came shortly after. (19a).

Marwan denied writing a letter to Defendant while Defendant was in jail, and denied that his handwriting was on the letter shown to him by defense counsel. The salutation was to "brother" and it was signed "Wan." (21a). Both letters were received into evidence. (22a).

A portion of the letter allegedly written by Defendant was read into the record:

"Marwan, I don't believe you're testifying against me. Even though I was upset at your father for calling Protective Services on my son, it doesn't mean I would take it out on your house and put you in danger." (23a).

Officer Robin Rohloff testified that he went to Ms. Aliakbar's house on January 17, 1999, and observed a bottle in the driveway. (24a). The window of the house was broken. Lieutenant Donald Catlin, an arson investigator, testified that he inspected the house and his investigation revealed that a fire originated from flammable liquid from a molotov cocktail thrown at the living room window. (26a-27a). The fire resulted in charring to the exterior window frame, and the curtain inside was partially consumed. (29a). He concluded that it was

an “incendiary act.” The accelerant was gasoline. The Lieutenant spoke to Mrs. Aliakbar and Marwan and placed Defendant under arrest. (27a).

The letter admitted by the defense, received by Defendant from his brother, stated, “Give me \$300.00 and I’ll drop these charges. I really don’t think you did it, anyway.” (30a).

The trial court made its findings, concluding:

“The police have testified that they saw the broken bottle. They’ve also indicated that the house was in fact burned. There was charring. And that there was the presence of accelerant, gasoline, inside the bottle.

And even though the defendant’s brother wants to make some money, I believe his testimony about what he saw. Which means he’s no better than his brother; he’d do anything to get money. But I believe it.

There’s circumstantial evidence to show that this did happen. And that’s the only evidence that the Court has. I believe it.

I’ll find him guilty of Arson. This was a dwelling house, and it was burned. there’s no question about it.

I mean, I can tell by his attitude when he was on the stand testifying, and I guess he doesn’t realize that. That’s certainly counterproductive. He didn’t help anybody by doing that. Okay. Thank you. Remanded.” (31a).

At sentencing, Defendant claimed his innocence. The court stated that it was difficult to believe that his mother and brother would “come in here and lie on you. That doesn’t make sense.” (35a). Defendant stated that the motive to lie was something that happened two years ago. (36a). The court rejected the sentencing guidelines, which recommended a minimum sentence of 15 to 25 months, finding it absurd that someone who hasn’t heard the case would suggest a sentence:

“The Court rejects the Sentencing Guidelines, because it does not truly reflect the gravity of this offense. And the exposure to danger that these people have been put through, and the fact that they’re living in fear of this matter continuing, the Court is going to reject the Sentencing Guidelines.

I will not follow what I think is absurd in these cases for someone who hasn't heard this case, does not know the gravity of the offense, to make a suggestion to the Court about what the sentence should be.

Seven and a half to 20. Also, it should be noted on the record that you did enter a plea before another judge. The judge permitted you to withdraw that plea. So, you're statement of innocence." (40a-41a).

The court sentenced Defendant to 7 1/2 to 20 years in prison. (41a).

Defendant Aliakbar appealed as of right, and the Court of Appeals affirmed his sentence in an unpublished, per curiam opinion dated October 2, 2001. (58a). The Michigan Supreme Court granted leave to appeal in an order dated September 18, 2002. (60a).

I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN SENTENCING MR. ALIAKBAR TO SEVEN AND ONE HALF TO TWENTY YEARS IN PRISON, NEARLY FOUR TIMES THE MINIMUM GUIDELINES SENTENCE, WITHOUT STATING ON THE RECORD OBJECTIVE AND VERIFIABLE, SUBSTANTIAL AND COMPELLING REASONS NOT ALREADY CONSIDERED IN THE GUIDELINES; THE TRIAL COURT ABUSED ITS DISCRETION IN DEPARTING FROM THE GUIDELINES WITHOUT SUBSTANTIAL AND COMPELLING REASONS.

Factual Background

Defendant Ntuku Aliakbar was convicted of arson and he was sentenced on May 24, 2000. The statutory sentencing guidelines were prepared and recommended a minimum sentence range of 15 to 25 months. Defendant claimed his innocence, and explained that his brother and mother were lying because of something that happened two years ago. (36a). The court heard a statement by Defendant's mother, one of the complainants. She claimed that Defendant had tried to set the house on fire approximately two months before the instant offense, although she did not see Defendant. She also claimed that he broke out the windshield of her husband's vehicle. (37a-38a). The court then allowed Defendant to continue his allocution, and Mr. Aliakbar stated:

"... all I really want is to – this is my first time in the criminal system, and my last time.

And all I want is to get back to my family and support my two sons. And – they're honorable sons. And to raise them the best I can so they can – raise them the best that I can so they can do well in whatever – in life they would like to do." (40a).

The judge made the following comments before imposing a sentence of 7 ½ to 20 years in prison:

“Well, this Court knows, after many, many cases of tragedies that have resulted from impulsive acts such as sitting [sic] fires and throwing Molotov Cocktails, which would have resulted in the death of your entire family.

In fact, again, the witness was your mother, and your brother. And I know this is no laughing matter. It’s no matter that, as suggested by the Sentencing Guidelines, is something slight and can be overlooked.

The Court has heard the testimony in this case. And I’ve heard the statements by your mother at the trial, and your brother.

The Court rejects the Sentencing Guidelines, because it does not truly reflect the gravity of this offense. And the exposure to danger that these people have been put through, and the fact that they’re living in fear of this matter continuing, the Court is going to reject the Sentencing Guidelines.

I will not follow what I think is absurd in these cases for someone who hasn’t heard this case, does not know the gravity of the offense, to make a suggestion to the Court about what the sentence should be.

Seven and a half to 20. Also, it should be noted on the record that you did enter a plea before another judge. The judge permitted you to withdraw that plea. So, you’re statement of innocence.” (40a-41a).

Defendant appealed his sentence to the Court of Appeals, arguing that, while this offense was serious, the trial court failed to state substantial and compelling for the massive departure, which was nearly four times the upper limit of the statutory sentencing guidelines. Mr. Aliakbar’s sentence was affirmed in an unpublished, per curiam opinion dated October 2, 2001. The Court of Appeals decided that Defendant’s continuing pattern of criminal activity against his family was a substantial and compelling reason for departure. (59a). This Court granted leave to appeal and directed the parties to include the following issues:

- (a) whether the Wayne Circuit Court satisfied the ‘substantial and compelling reason’ requirement of MCL 769.34(3),
- (b) whether the Wayne Circuit Court satisfied the ‘states on the record’ requirement of MCL 769.34(3),

- (c) the standard of appellate review for the Court of Appeals in light of MCL 769.34(11), and
- (d) the standard of appellate review for this Court.” (60a).

Standard of Review in Court of Appeals

There are three standards of review used by the Michigan courts. The de novo (defined as “anew,” “over again”) standard is applied to questions of law and gives no deference to the ruling of the court below. United States v Griffith, 17 F3d 865, 877 (CA 6, 1994); People v Carpenter, 446 Mich 19, 60 n19 (1994); Fletcher v Fletcher, 447 Mich 871, 882 (1994). The clearly erroneous standard applies to the lower court’s findings of fact. MCR 2.613C. A finding is clearly erroneous if the reviewing court is left with a firm conviction that the trial court made a mistake. People v Manning, 243 Mich App 615, 620 (2000). The abuse of discretion standard involves the idea of making a choice between competing considerations. This standard applies to decisions that require careful consideration of all surrounding circumstances. It generally applies to a trial court’s determination of evidentiary issues. People v Adair, 452 Mich 473 (1996). If a lower court’s discretionary decision is based on an error of law, it is *necessarily* an abuse of discretion. People v Lukity, 460 Mich 484 (1999).

For any issue involving a departure from the sentencing guidelines, whether an upward or downward departure, the Court of Appeals has adopted the standard of review established by this Court in People v Fields, 448 Mich 58, 78 (1995), a case which involved a downward departure from a mandatory controlled substances sentence. Thus, in reviewing a departure issue, three standards of review have been applied:

- A) The determination regarding the existence or nonexistence of a particular reason or factor is reviewed on appeal under the clearly erroneous standard since it involves a factual determination. People v Perry, 216 Mich App 277 (1996); People v Babcock,

244 Mich App 64 (2000) (Babcock I); People v Babcock, 250 Mich App 463 (2002) (Babcock II).

- B) The determination that a particular factor is objective and verifiable is reviewed by the Court of Appeals de novo. People v Babcock, supra.
- C) The trial court's determination that objective and verifiable factors in a particular case present a substantial and compelling reason for departure is reviewed for an abuse of discretion.

This Court in People v Hegwood, 465 Mich 432 (2001), noted that the guidelines statute makes no distinction between upward and downward departures. It follows that the standard of review would be the same for each. Since Babcock I, the Court of Appeals has been obligated to apply the Fields standard.

The trial court may depart from the legislative sentencing guidelines range only if it has a substantial and compelling reason to do so and if it states on the record the reason for departure. MCL 769.34(3). The terms "substantial and compelling" were defined by the Supreme Court in the context of mandatory minimum sentences for controlled substance offenses. People v Fields, supra.

The Court stated:

"Statutes should be interpreted according to the common and approved usage of any undefined words within them. MCL 8.3a; MSA 2.212(1). Webster's New World Dictionary, Third College Edition defines "substantial," in relevant part, as "2 real; actual; true; not imaginary 3 strong; solid; firm; stout 4 considerable; ample; large 5 of considerable worth or value; important . . ." It defines "compelling," in relevant part, as "irresistibly or keenly interesting, attractive, etc.; captivating "

From these definitions it is evident that **the words "substantial and compelling" constitute strong language**. The Legislature did not wish that trial judges be able to deviate from the statutory minimum sentences for any reason. Instead, the reasons justifying departure should "keenly" or "irresistibly" grab our attention, and we should recognize them as being "of considerable worth" in deciding the length of a sentence.

• * *

... In this context "substantial and compelling" cannot acquire a meaning that would allow trial judges to regularly use broad discretion to deviate from the statutory

minimum. Such an interpretation would defeat the intent of the statute. Rather, it is reasonable to conclude that the Legislature intended “substantial and compelling reasons” to exist only in exceptional cases.” Id. At 67-68.

By statute, certain factors may not be used as reasons for departure. A court may not depart because of defendant’s “gender, race, ethnicity, alienage, national origin, legal occupation, lack of employment, representation by appointed legal counsel, . . . appearance in propria persona, or religion.” MCL 769.34(3)(a). The court also may not premise a departure on an offense characteristic already considered in determining the appropriate guidelines range unless the court explicitly finds from the facts of record that the characteristic was given inadequate or disproportionate weight. People v Hornsby, ___ Mich App___ (#227945, 5-24-2002). MCL 769.34(3)(b) states:

(b) The court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.” Chapter XIV, Sec. 34.

Thus, the court may depart for nondiscriminatory reasons where there are legitimate factors not considered by the guidelines or where factors considered by the guidelines have been given inadequate or disproportionate weight. People v Armstrong, 247 Mich App 425 (2001). Whether a stated reason is one of the factors prohibited by MCL 769.34(3)(a), or a factor already taken into account in the guidelines, is a question of law, and should therefore be reviewed de novo. Whether a factor has been given inadequate or disproportionate weight is a matter of discretion, reviewed for abuse.

Under federal law, the standard of review is similar. A district court’s decision to depart from the guidelines sentencing range is reviewed for abuse of discretion. United States v Barber,

200 F3d 908,911 (CA 6, 2000); United States v Chance, ___ F3d ___ (CA 6, #99-4437, 9-19-02).

A district court has abused its discretion “if the appellate court is left with a definite and firm conviction that the court below committed a clear error of judgment.” United States v Guy, 978 F3d 934, 939 (CA 6, 1992); United States v Chance, supra. Whether a stated ground is a permissible basis for departure is a question of law which is reviewed de novo. United States v Sabino, 274 F3d 1053 (CA 6, 2001).

The analysis does not end here. Under both Michigan and federal law, the extent of the departure must be reviewed. According to People v Hegwood, supra, and Babcock II, even if a departure from the guidelines is warranted, the extent of the departure might be disproportionate to the offense and the offender. Under federal law, after determining that a departure by the district court was not based on impermissible factors, the appellate court reviews a sentence that is outside the applicable guideline range for reasonableness. United States v Barajas-Nunez, 91 F3d 826, 934 (CA 6, 1996); United States v Chance, supra. “The reasonableness determination looks to the amount and extent of the departure in light of the grounds for departing.” United States v Crouse, 145 F3d 786, 789 (CA 6, 1998). In assessing reasonableness, the appellate court must examine the factors to be considered in imposing a sentence under the guidelines, as well as the district court’s stated reasons for the imposition of the particular sentence. United States v Chance, supra.

Standard of Review in Supreme Court

On appeal to the Supreme Court, the standard of review of the lower court’s sentence departure does not change. In reviewing the Court of Appeals’ decision on the issue of admissibility of similar acts evidence, the opinion in People v Hine, ___ Mich ___ (#120484, 9-

17-02) seems to indicate that the Supreme Court will determine whether the Court of Appeals applied the appropriate standard and whether it operated within the correct legal framework. See Koon v United States, 518 US 81; 116 SCt 2035; 135 Led2d 392 (1996), where the Supreme Court found that the Ninth Circuit Court of Appeals had invoked the wrong standard in reviewing the district court's decision to depart downward from the federal sentencing guidelines. According to Hine, mere disagreement with the trial court is not the proper application of the appropriate standard of review, which in Hine was abuse of discretion. However, the Court in People v Hedgwood, supra, applied the de novo standard of review to a departure from the guidelines because that case presented "an issue concerning the proper application of the statutory sentencing provision, including MCL 777.1 et seq and 769.34."

MCL 769.34(11) refers to the "court of appeals" in addressing appellate review:

"(11) If, upon a review of the record, the court of appeals finds the trial court did not have a substantial and compelling reason for departing from the appropriate sentence range, the court shall remand the matter to the sentencing judge or another trial court judge for resentencing under this chapter."

This should not be taken to mean that the Supreme Court lacks authority to review a departure from the guidelines. Where the Legislature includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that the Legislature acted purposely in this disparate inclusion or exclusion. Duncan v Walker, 533 US 167; 121SCt 2120; 150 LEd2d 251 (2001). However, that is not the case here. The only other sections of the statute which speak of appellate review, MCL 769.34(8) (designating what shall be part of the record on appeal), MCL 769.34(9) (stating that an appeal of a sentence does not stay its execution), and MCL 769.34(10) (directing the court of appeals to affirm a sentence under certain circumstances and stating how to preserve an issue for appeal), do not include the

particular language, “the Court of Appeals and the Supreme Court.” Thus, there is no intent to exclude review by the Supreme Court. Furthermore, this “negative pregnant” rule of construction is limited, and does not apply if it would not result in the correct standard or if the inference would lead to an unreasonable result. Field v Mans, 516 US 59; 116 SCt 437; 133 LEd2d 351 (1995).

Indeed, the Court People v Hegwood, supra, undertook appellate review of a guidelines departure. As this Court recognized in People v Coles, 417 Mich 523 (1983), no constitutional or statutory provision exists which limits the review power of the Supreme Court or precludes it from passing upon the propriety of sentences imposed by trial courts, and the constitutional right to an appeal in a criminal case includes the right to sentence review. *Id* at 446. This Court further observed:

“The judicial power of this Court has been further defined in MCL 600.212-600.223; M.S.A. §§ 27A.212-27A.223, which, *inter alia*, grant appellate jurisdiction over any matter or question of law brought before the Court in an authorized manner and grant the Court the power to promulgate and amend general court rules governing the practices and procedures in all courts of record. These rules may include practices and procedures for the method of review of decisions from inferior tribunals. Furthermore, this Court has defined its authority, as permitted by the foregoing constitutional and statutory provisions, to include the power to:

‘Give any judgment and make any order which ought to have been given or made, and make such other and further orders and grant such relief as the case may require.’ GCR 1963, 865.1(7).

Thus, it is clear that this Court has a broad jurisdiction and far-reaching powers in the area of appellate review.” *Id* at 534-535 (emphasis added).

This Court concluded that both the Court of Appeals and the Supreme Court have jurisdiction to review all sentencing issues:

“We conclude that a sentence following a conviction is as much a part of the final judgment of the trial court as is the conviction itself. Since the Court of Appeals

has jurisdiction to hear appeals from final judgments of trial courts, whether the appeal be one to which a defendant is absolutely entitled or one in which a defendant must apply for leave to appeal, the Court of Appeals has jurisdiction to hear appeals involving a review of a defendant's sentence. We find no sound reason for interpreting the applicable constitutional and statutory provisions as carving out an exception to the right of appeal regarding sentencing matters. None of those relevant provisions limit the particular issues subject to appellate review. We therefore conclude that **the foregoing constitutional and statutory authority vest appellate courts with the jurisdiction to review all sentencing issues.**

The foregoing analysis applies not only to the appellate jurisdiction of the Court of Appeals, but also to that of the circuit courts and of this Court.” Id at 535-536. (Emphasis added).

The Coles Court also found that judicial review of sentencing does not violate the separation of powers:

“Indeterminate sentencing, by its very nature, requires the trial court to exercise a certain degree of discretion in the imposition of a sentence. This does not amount to an encroachment by the judiciary into the legislative prerogative of establishing punishment for crimes. As we stated in ‘The policy expressed by the people, in providing by constitutional amendment for an indeterminate sentence law, directed the legislature to adopt a flexible law and the courts to fit the punishment in the exercise of their discretion to the needs of the particular case. In no other way could the will of the people be carried into effect. A discretion must be exercised in order to have indeterminate sentences.’

* * *

... **it is the responsibility of the courts to correct error** and resentence the defendant to a valid sentence.” Id at 539-540.

The Legislature, in enacting MCL 769.34, did not prohibit the Supreme Court from conducting its normal review of sentencing. It remains true that “no constitutional or statutory provision exists which limits the review power of this Court or precludes it from passing upon the propriety of sentences imposed by trial courts.” And it is still clear that “this Court has a broad jurisdiction and far-reaching powers in the area to appellate review” of sentencing.

Trial Court's Failure to State on the Record Substantial and Compelling Reasons

All three standards of review must be considered in addressing the departure in the instant case. The trial court departed from the guidelines range of 15 to 25 months, and made the following statement:

“The Court rejects the Sentencing Guidelines, because it does not truly reflect the gravity of this offense. And the exposure to danger that these people have been put through, and the fact that they’re living in fear of this matter continuing, the Court is going to reject the Sentencing Guidelines.

I will not follow what I think is absurd in these cases for someone who hasn’t heard this case, does not know the gravity of the offense, to make a suggestion to the Court about what the sentence should be.

Seven and a half to 20. Also, it should be noted on the record that you did enter a plea before another judge. The judge permitted you to withdraw that plea. So, you’re statement of innocence.” (40a-41a).

First of all, in stating that “the Court is going to reject the Sentencing Guidelines. . . . I will not follow what I think is absurd in **these cases for someone who hasn’t heard this case**, does not know the gravity of the offense, to make a suggestion to the Court about what the sentence should be,” the trial court was rejecting, **not only the guidelines range in this case**, but the sentencing guidelines in general, finding it absurd that someone not familiar with “these cases” could determine a proper sentence. The trial court acted in violation of the law, and this issue is reviewed de novo. The instant case is similar to People v Hedgwood, supra, in this regard. In Hedgwood, the trial court stated:

“I could care less what the legislature through its rule making authority says as to the guidelines that I could impose, or what kind of sentence I would impose.

When the legislature and the senators take over and start becoming judges in the State of Michigan, they can impose the sentences.

But in the meantime we still have separate and co-equal branches of government,

wherein it's my position and my responsibility, my authority to fix the sentence when someone is convicted of a felony.

And I'm an elected official, I hold this office because the people of this county and this state entrusted with me the power and the authority to enforce the criminal laws of this state. You're a con. I believe you belong in prison."

This Court found that the trial court had violated the law, pointing out that the ultimate authority to provide for penalties for criminal offenses is constitutionally vested in the Legislature, and that "[I]t is, accordingly, the responsibility of a circuit judge to impose a sentence, but only *within the limits* set by the Legislature." Id at 437 (emphasis in original). The Court compared the former, non-obligatory judicial guidelines, which had an "open-ended" departure policy, to the legislative guidelines, which are mandatory: "[b]y formal enactment of the Legislature, Michigan became subject to guidelines with sentencing ranges that *do* require adherence." Id at 438. The circuit court in Hegwood had stated several reasons for the sentence it imposed, including that the defendant was a professional criminal, that he was "supporting the drug trafficking in the State of Michigan," and that his conduct was "inexcusable." Id at 435, 440. However, the trial court did not appear to recognize that it was permitted to depart from the range prescribed by the Legislature only "if the court has a substantial and compelling reason for that departure and states on the record the reason for departure." Id at 440. This Court concluded that the trial court's remarks:

"demonstrate the court's misunderstanding in this case of the respective roles of Michigan's separate branches of government. Contrary to the circuit court's view, the Legislature may impose restrictions on a judge's exercise of discretion in imposing sentence.

For these reasons, we vacate the sentence in this case, and remand it to the circuit court for resentencing consistent with the law."

In the instant case, as in Hedgwood, the trial court stated reasons for the sentence. However, just as in Hedgwood, the court failed to recognize that it could depart from the guidelines only for substantial and compelling reasons. By stating that “I will not follow what I think is absurd in **these cases** for someone who hasn’t heard this case, does not know the gravity of the offense, to make a suggestion to the Court about what the sentence should be,” the trial court failed to recognize that the legislative guidelines require adherence, that “the Legislature may impose restrictions on a judge’s exercise of discretion in imposing sentence.” Therefore, Mr. Aliakbar’s sentence should be vacated and resentencing ordered.

If this Court determines that the sentencing judge properly recognized his legal obligations, and if this Court considers the trial court’s reasons for the sentence as reasons for departing from the legislative guidelines, Mr. Aliakbar submits that the lower court erred as a matter of law in finding that the “continuing pattern” of criminal activity against his family or their fear of Defendant were objective and verifiable reasons.

Although Mr. Aliakbar’s mother assumed that it was Defendant who twice attempted to burn her house, Mr. Aliakbar denied setting either fire. The judge found him guilty, obviously, of the instant arson, but he was never charged with the first fire and, apparently, was not observed trying to set the fire. The “continuing conduct” was therefore not verifiable. A sentencing court may take into consideration uncharged conduct only so long as that conduct has been proven by a preponderance of the evidence. United States v Watts, 519 US 148, 154, 157 (1997). Defendant was given 5 points under prior record variable 6 for the malicious destruction of the van. The judge did not indicate that the guidelines failed to adequately account for that prior offense. (See discussion, *infra*). The family’s fear, like the possible nightmares of the robbery victims in People v Tom Norman, unpublished opinion (#238508, 9-27-02) (61a), is a

subjective factor and not a proper basis for departure because it fails to meet the “objective and verifiable” standard. MCL 777.34.

The “gravity of the offense” was taken into account by the guidelines. Arson is considered a very serious crime against a person. Thus, offense gravity is inherent in the guidelines for arson. In United States v Chance, supra, the Sixth Circuit noted that, since Congress’ purpose in enacting the RICO statutes was to eradicate organized crime, the Sentencing Commission must have considered this factor in developing an appropriate sentencing guideline for RICO offenses, thereby making the organized crime-involvement factor an inappropriate reason for departure.

Moreover, Defendant was given 15 points under OV 2 for possession of an incendiary device. Considering the fact that only the curtain and an area around the window actually were charred, and that no one was hurt, the score received by Mr. Aliakbar adequately reflected the gravity of the offense. Furthermore, the judge did not indicate which offense characteristic was given inadequate weight, as required by MCL 769.34(3)(b). As the Court of Appeals held in People v James Q. Hornsby, ___ Mich App ___ (#227945, 5-24-02):

“The court also may not premise a departure on an offense characteristic or offender characteristic already considered in determining the appropriate guidelines range **unless the court explicitly finds from the facts of record that the characteristic was given inadequate or disproportionate weight.**” (Emphasis added).

The trial court in the instant case failed to state “explicitly” which characteristic was given inadequate or disproportionate weight. Thus, the sentencing judge erred as a matter of law. The question of whether he abused his discretion in departing from the guidelines cannot be reached on this record.

Trial Court's Abuse of Discretion

Even assuming the question of abuse of discretion can be reached, Mr. Aliakbar asserts that the trial court abused its discretion in both departing, and in the extent of the departure. This case clearly involved a domestic dispute, with family members placing the blame on each other. Defendant attempted to explain that his mother and brother were lying and casting blame on him for something that happened two years ago. (36a). Mr. Aliakbar claimed his innocence throughout. Defendant had **no** prior convictions whatsoever. (He subsequently pled guilty to the misdemeanor offense of malicious destruction of property less than \$100). (44a). He was 27 years old and employed full time. (50a). Absent proof by a preponderance of the evidence that Defendant was guilty of setting a previous fire, and considering the minor damage to the house, the fact that no one was injured, and the lack of any previous criminal history, the trial court made an error in judgment, thereby abusing its discretion, in sentencing Defendant to four times the upper end of the appropriate guidelines. The reasons given by the trial court were not compelling. This case does not present a worst-case scenario, and the fact that there was an ongoing domestic dispute is not an "irresistible" factor such that a departure of almost 400 percent is justifiable.

In People v Milbourn, 435 Mich 630, 636; 461 NW2d 1 (1990), the Michigan Supreme Court adopted the "principle of proportionality" for reviewing the length of sentences. In Milbourn, the Supreme Court held that the guidelines are the "best barometer of where on the continuum from the least to the most threatening circumstances a given case falls." Id. at 656. The Court also held that a departure from the guidelines, especially one based on factors already taken into consideration by the guidelines themselves, should alert the reviewing court to a possible violation of the principle of proportionality. The Court stressed that the sentencing court

should fashion a sentence to leave room for the principle of proportionality to operate, so that an offender convicted of the same crime who has a more serious prior criminal record or whose offense was more aggravated with regard to that offense can receive a more severe sentence. Id. at 656, 658-659. Defendant Aliakbar had no prior convictions, and the offense was not “aggravated”: no one was injured and the damage was relatively minor.

In People v Harris, 190 Mich App 652; 476 NW2d 767 (1991), the Court of Appeals stated that the Milbourn analysis requires a threefold inquiry:

- "1. If the sentence is to be within the guidelines, where on the guideline range should the sentence fall?
2. What unique facts exist that are not already adequately reflected in the guidelines, and why do such facts justify any departure from the guidelines?
3. If there is to be a departure, what should be its magnitude and the justification for the specific departure imposed?" Harris, *supra* at 668-669.

In People v Benson, 200 Mich App 598; 504 NW2d 911 (1993), the Court reiterated the three-part test in Harris, *supra*. The Court noted that "Harris does not impose any new requirement other than those found in Milbourn but merely provides a systematic method for arriving at a sentence in accordance with the Milbourn standards." Benson, *supra* at 603. The Court quoted Harris, *supra*, at 669:

"The inquiry that we impose here will enable the trial judge to comply with the mandate of Milbourn in a manner that reduces the risk of irrational sentencing that is either too low or too high for the given case." Benson, *supra* at 693.

In People v Antolovich, 207 Mich App 714; 525 NW2d 513 (1994), the Court of Appeals vacated a sentence of 4 to 20 years in prison, finding the sentence disproportionate and holding that the proffered departure reasons [deterrence, protection of society, rehabilitation and punishment] did not suffice to explain why this sentence, rather than a higher or lower one, was imposed. And in

People v Houston, 448 Mich 312; 532 NW2d 508 (1995), the Supreme Court reiterated that in the absence of factors legitimately considered at sentencing and not adequately considered by the applicable guidelines, a departure from the recommended range indicates the possibility that a sentence may be disproportionate.

Again, the reasons given by the trial court in this case were not substantial and compelling. As the Court of Appeals observed in People v Harris, supra at 652, “Certainly every case is unique, but one purpose of the sentencing guidelines is to avoid turning each unique feature of a case into a separate category.” Even had Mr. Aliakbar been given the absolute maximum number of points for serious psychological injury to the victims, requiring professional treatment, the guidelines range would have been far less (36-60 months) than the sentence imposed by the court. The sentence of 7 ½ to 20 years in prison, an upward departure of almost 400 percent, is out of all proportion to the offense and the offender.

For all the foregoing reasons, Defendant Ntuku Aliakbar should be resentenced.

SUMMARY AND RELIEF SOUGHT

Defendant-Appellant asks this Honorable Court to vacate Defendant Aliakbar's sentence and grant him a resentencing.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY:



CHARI GROVE (P25812)

Assistant Defender

3300 Penobscot Building

645 Griswold

Detroit, Michigan 48226

(313) 256-9833

Date: October 31, 2002